SUPRE

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IE COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 400

WILLIAM J. VERES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondent, STATE OF ARIZONA, by and through its Attorney General, GARY K. NELSON, pursuant to Rules of the Supreme Court, Rule 24, responds to the Petition for Writ of Certiorari heretofore filed herein.

OPINION BELOW

Pursuant to Rules of the Supreme Court, Rule 40, sub.sec. 3, and for purposes of this petition only, your respondent accepts petitioner's presentation of the Opinion Below.

JURISDICTION

Pursuant to Rules of the Supreme Court, Rule 40, sub.sec. 3, and for purposes of this petition only, your respondent acknowledges the jurisdiction of this Court as set forth by petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to Rules of the Supreme Court, Rule 40, sub.sec. 3, and for purposes of this petition only, your respondent acknowledges that petitioner properly sets out the constitutional provisions involved.

QUESTION PRESENTED FOR REVIEW

Was respondent's probation properly revoked in the absence of confrontation of witnesses?

ARGUMENT

Respondent's probation was properly revoked in the absence of confrontation of witnesses.

Due process in a proceeding to deprive one of his liberty has been held to require that evidence obtained by an unreasonable search and seizure be excluded, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); that no comment be made at trial on his silence, *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); that he be represented by counsel, at state expense if necessary, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); that he is entitled to effective representation by counsel, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); that he is entitled to the aid of counsel at the lineup, *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); that he is entitled to confront and cross-examine witnesses against him, *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); that he can obtain witnesses in his favor by compulsory

process, *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); that he not be subjected to cruel and unusual punishment, *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); that he be afforded a fair trial, *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); and that coerced confessions be excluded, *Chambers v. Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The procedure complained of by petitioner, in a post-conviction proceeding, cannot reasonably be considered violative of due process of law as that concept has been construed in the above cases.

Arizona has consistently held that probation is a matter of grace and a matter of discretion with the trial judge, and has held in essence that the trial judge can revoke probation for any reason that recommends itself to him, including presumably, the belief that probation was improvidently granted. The Arizona Supreme Court in *State v. Maxwell,* 97 Ariz. 162, 398 P.2d 548 (1965) stated:

> "We have researched the nature of the proceedings necessary to safeguard the rights of an alleged parole violator. At such a proceeding the rights of the parole violator are not conferred by constitution but are conferred by statute. Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566. To remain at liberty under a suspended sentence is not a matter of right but a matter of grace and purely in the discretion of the trial court, Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569. A proceeding for revocation of probation is not subject to the limitations of a trial on the merits and is not governed by the same rules, People v. Slater, 152 Cal.App.2d 814, 313 P.2d 111.
>
> This court quoting from the United States Supreme Court in Escoe v. Zerbst, supra, stated in Varela v. Merrill, supra:
>
> 'In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.' 51 Ariz. at 72, 74 P.2d at 573.

The only question here is whether appellant's rights under the Arizona statute were violated. The source of appellant's rights while on probation is in the statute rather than in the Fifth Amendment to the United States Constitution. Escoe v. Zerbst, supra.

A.R.S. § 13-1657, subsec. B reads:

'At any time during the probationary term of the person released on probation, any probation officer may, without warrant or other process, at any time until the final disposition of the case, re-arrest any person so placed in his care and bring him before the court, or the court may, in its discretion, issue a warrant for the re-arrest of any such person and may thereupon revoke and terminate the probation, if the interests of justice so require, and if the court, in its judgment, has reason to believe that the person so placed upon probation is violating the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life.'

We are of the opinion that the appellant was accorded his rights in conformance with the purposes of the statute and are of the opinion that the trial judge's action was within his sound discretion in revoking probation. State v. Edge, 96 Ariz. 302, 394 P.2d 418." (p. 164-165)

Accord, State v. Edge, 96 Ariz. 302, 394 P.2d 418 (1964); *Varela v. Merrill,* 51 Ariz. 64, 74 P.2d 569 (1937); *State v. Washington,* 5 Ariz.App. 400, 427 P.2d 381 (App. 1967); and *State v. Benton,* 5 Ariz.App. 314, 426 P.2d 414 (App. 1967).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

WILLIAM E. EUBANK
Chief Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA }
County of Maricopa } ss.

WILLIAM E. EUBANK, being first duly sworn upon oath, deposes and says:

That pursuant to Rules of the Supreme Court, Rule 33, sub.sec. 3(c), he served the attorneys for the petitioner in the foregoing case by forwarding two (2) exact copies of Respondent's Response to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Phillip Weeks
Burton & Weeks
P. O. Box 1486
Scottsdale, Arizona 85252

this_____day of September, 1968.

_____

SUBSCRIBED AND SWORN to before me this_____day of September, 1968.

_____
Notary Public

My commission expires:

_____